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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY THOMAS LEON, et al, Defendants and Appellants.	B206355 (Los Angeles County Super. Ct. No. PA 059604)

APPEALS from judgments of the Superior Court of Los Angeles County. Rick Brown, Judge. Affirmed and affirmed as modified.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Thomas Leon.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Ray Medina.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Anthony Thomas Leon and Anthony Ray Medina filed timely notices of appeal from their convictions for residential burglary. The jury found true the allegations that a person other than a perpetrator was present. Medina admitted a prior conviction allegation. The court sentenced Leon to the low term of two years in state prison and Medina to the midterm of four years, doubled under the Three Strikes Law, for a total of eight years in state prison. Defendants raise a variety of issues. We affirm the judgment against Medina and affirm the judgment against Leon as modified.

FACTUAL BACKGROUND

I. Prosecution Case

About 3:30 a.m. on July 31, 2007, Martin Torres was sleeping on the couch in his front room waiting for his daughter Cynthia to return from a date. Torres awoke to find Medina inside his home. Torres asked Medina what he was doing, and Medina responded he was "'going to the bathroom.'" Medina then ran from the house.

Torres ran after Medina and found Leon standing at the end of the driveway. Leon approached Torres with fists raised in a threatening manner. Both defendants left and headed towards Laurel Canyon Blvd. Torres followed defendants and noticed they were removing their clothes as they were fleeing.

Torres returned to his home, got into his car and went looking for defendants. Torres found them wearing different clothes on Brand Avenue. Torres returned home where his wife was speaking with a 9-1-1 operator. Torres gave the operator a description of defendants.

San Fernando police officers found defendants and detained them. Officers brought Torres to the location where he identified defendants. Officer Robert Gallegos transported Leon to the police station. While en route, without being asked any questions, Leon stated he had not entered the residence and he was just standing outside as a lookout. Leon specifically used the word "lookout."

At the station, the identification card of Torres's daughter Cynthia was found in Medina's pants pocket. The identification card had been in Cynthia's car, which had been parked in front of the house. Cynthia found a cigarette butt in her car when she checked it at the request of the police. Cynthia does not smoke and does not permit others to smoke in her car.

II. Defense Case

On the night of the burglary, Medina and Leon were hanging out with friends and drinking alcohol. At some point, Medina and Leon were walking on Brand on the way to another friend's house. Defendants asked a stranger to buy alcohol for them and gave the man $10. The man told defendants to wait on the porch of a nearby house, where he said he lived, and said he would be back in 10 or 15 minutes. After waiting about 30 minutes, Medina saw lights on in the house and, thinking the man had returned through the back, knocked and then banged on the front door, which was opened slightly. Medina did not tell Leon where he was going before approaching the porch.

Medina did not enter the residence, but saw Torres walking down the hallway. Torres asked Medina what he was doing, and Medina said he needed to use the restroom. When Torres ran down the hallway, Medina assumed Torres was going to call the police; Medina left, telling Leon "'let's go.'" Medina also told Leon the guy in the house was "tripping." Defendants then walked, without changing any clothes, until they were detained by police. Medina denied ever being inside the residence or asking Leon to be his lookout. Medina found the identification card on the street and had intended to use it to crush some methamphetamine crystals.

DISCUSSION

I. Jury Instructions

A. Aiding and Abetting

The court gave CALCRIM No. 400 (a person who aids and abets the actual perpetrator of a crime is equally guilty of the offense) and CALCRIM No. 1702, which provides:

> To be guilty of burglary as an aider and abettor, the defendant must have known of the perpetrator's unlawful purpose and must have formed the intent to aid, facilitate, promote, instigate, or encourage commission of the burglary before the perpetrator left the structure.

The court did not give CALCRIM No. 401, which provides in pertinent part:

> To prove that the defendant is guilty of a crime based on aiding and abetting that crime the People must prove that:
>
> 1. The perpetrator committed the crime;
> 2. The defendant knew the perpetrator intended to commit the crime;
> 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; AND
> 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

CALCRIM No. 401 also instructs that mere presence at the scene of a crime or failing to prevent a crime does not, by itself, make a person an aider and abettor.

Leon contends the court's incomplete instructions on aiding and abetting lessened the prosecution's burden of proof and violated his rights to due process and a jury trial. Leon argues that because the jury was not required to find he in fact aided and abetted the crime, it might have convicted him for merely being present as it had ample reason to disbelieve Gallegos's testimony Leon said he was acting as a lookout.

The court has a sua sponte duty to instruct on aiding and abetting when the prosecution relies on it as a theory of culpability as the prosecutor did here. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561; Bench Notes to CALCRIM No. 401 (2008) p. 162.) CALCRIM No. 1702 notes that CALCRIM No. 1702 must be given with CALCRIM No. 401. (Bench Notes to CALCRIM No. 1702, *supra*, p. 1188.) Thus, the court erred by not giving CALCRIM No. 401.

"'In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights.' A court is required to instruct on the law applicable to the case, but no particular form is required; the instructions must be complete and a correct statement of the law. The meaning of instructions is tested by 'whether there is a "reasonable likelihood" that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel.' '"[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."' Thus, absence of an essential element in a given instruction may be supplied by reference to another instruction, or cured in light of the instructions considered as a whole." (Citations omitted.) (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370-371.)

Respondent argues the portion of CALCRIM No. 400 that a person "may have aided and abetted someone else, who committed the crime" suffices to satisfy *Beeman* and CALCRIM No. 401. *Beeman* stated an aiding and abetting instruction should include language informing the jury a person aids and abets when he "by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman*, *supra*, 35 Cal.3d at p. 561.) CALCRIM No. 400 does not satisfy *Beeman* and CALCRIM No. 401 as it does not define aiding and abetting as including an act.

Although the error in not instructing the jury that Leon's words or conduct had to have in fact aided or abetted Medina's commission of the burglary was not cured by other instructions, during argument the prosecutor asserted that Leon assisted the burglary by his act of threatening Torres and his statement he was a lookout. Leon's counsel argued Leon's culpability depended on his statement he was a lookout and asked the jury to consider why was standing at the end of the driveway if Leon was acting as a lookout. Neither counsel argued Leon was guilty of aiding and abetting merely because he was present at the scene. Thus, it is not reasonably likely the jury misapplied the law and convicted Leon merely because he was present in light of the entire record, including argument, and the instruction did not lightened the prosecution's burden of proof.

Given the evidence Leon had threatened Torres when Torres chased Medina out of the house, Leon's statement he was a lookout, and the jury's rejection of Medina's version of what happened, the error in failing to give CALCRIM No. 401 was harmless beyond a reasonable doubt, i.e., the jury would have found Leon guilty beyond a reasonable doubt absent the error as this instructional error did not infect the jury's credibility determination–the key issue at trial. (See *People v. Cox* (2000) 23 Cal.4th 665, 676-677 & 677, fn. 6.)

B. Viewing Out-of-Court Statement with Caution

The court gave CALCRIM No. 358, which provided:

> You have heard evidence that a defendant made an oral statement before trial. You must decide whether or not the defendant made any such statement, in whole or in part. If you decide that the defendant made such a statement, consider the statement, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give such a statement. [¶] You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded.

Though the court gave an official instruction, defendants contend the sole exception to the rule about viewing oral statements with caution is when the statement was tape recorded. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200; *People v. Mayfield* (1997) 14 Cal.4th 668, 776.) Defendants suggest that the jury might have considered the fact Gallegos wrote notes and then wrote a police report as negating the instruction to view oral statement with caution.[1]

Respondent argues the instruction clearly refers to circumstances in which a defendant's statement is reduced to writing and accepted by the defendant. Defendants counter respondent is adding concepts not in the instruction and the jury would have accepted the instruction literally.

Whatever confusion could result from the instruction's reference to viewing an oral statement with caution unless it was written, in the case at bar, Leon's counsel strenuously argued it would have been more convincing if Leon had put his statement in writing, which he might have done as he did not know the law, and the statement was not recorded. In rebuttal, the prosecutor noted Leon's counsel had been taken aback by the fact the statement was not written nor recorded and reminded the jury of the instruction that statements that are not recorded should be viewed with caution if they had some doubts. Accordingly, we conclude the jury would not have thought Gallegos's reference to the statement in his notes meant it did not need to view Leon's oral statement with caution. Hence, the jury would have viewed Leon's statement with caution and would not have reached a more favorable result even if the instruction had not included that reference. (*People v. Dickey* (2005) 35 Cal.4th 884, 905; *People v. Carpenter* (1997) 15 Cal.4th 312, 393.)[2]

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[1] On cross-examination, Gallegos stated that once he got to the jail, he wrote Leon's statement on a field interview card, which he discarded after he wrote his report.

[2] Defendants suggest *Dickey* is not controlling as it involved the failure to give a cautionary instruction not giving an instruction that would have given Gallegos's

II. Co-Defendant's Statement

Medina contends the court erred by deny his motion to sever and admitting Leon's statement. The court ruled that striking the reference to Medina would cure any constitutional impediments to its admission as the statement did not necessarily place Medina inside the house. Thus, the court elected to redact the statement rather than exclude it or order separate trial.

"[T]he United States Supreme Court [in *Bruton v. United States* (1968) 391 U.S. 123] held that the admission into evidence at a joint trial of a nontestifying codefendant's confession implicating the defendant violates the defendant's right to cross-examination guaranteed by the confrontation clause, even if the jury is instructed to disregard the confession in determining the guilt or innocence of the defendant." (*People v. Lewis* (2008) 43 Cal.4th 415, 453.) In *Lewis*, the court noted a "codefendant's confession may be introduced at the joint trial if it can be edited to eliminate references to the defendant without prejudice to the confessing codefendant. If not, and the prosecution insists on introducing the confession, the trial court must sever the trials." (Citation omitted.) (*Id.*, at p. 454.)

In *Lewis*, the court noted that in a prior case it had reasoned that "'editing a nontestifying codefendant's extrajudicial statement to substitute pronouns or similar neutral terms for the defendant's name will not invariably be sufficient to avoid violation of the defendant's Sixth Amendment confrontation rights.' We explained that 'the sufficiency of this form of editing must be determined on a case-by-case basis in light of the statement as a whole and the other evidence presented at trial.'" (Citations omitted.) (*People v. Lewis, supra*, 43 Cal.4th at p. 454.) The court concluded that when, despite

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testimony an undeserved aura of credibility. However, the court noted, "Mere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution." (*People v. Dickey, supra*, 35 Cal.4th at p. 905.) We are bound by *Dickey*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

the redaction, the statement obviously refers directly to someone (often obviously the defendant) and involves inferences a jury ordinarily could make immediately, even were the confession the first item introduced at trial, the introduction of the codefendant's confession violates the defendant's rights under the confrontation clause. (*Id.*, at p. 455; see also *People v. Fletcher* (1996) 13 Cal.4th 451, 467 [Redaction "will adequately safeguard the nondeclarant's confrontation rights unless the average juror, viewing the confession in light of the other evidence introduced at trial, could not avoid drawing the inference that the nondeclarant is the person so designated in the confession and the confession is 'powerfully incriminating' on the issue of the nondeclarant's guilt."].)

Medina contends redacting his name was like replacing it with a space and obviously implied he was a lookout for someone as the court acknowledged when it noted the edited statement could be interpreted to mean Leon was acting as lookout for someone other than Medina. We agree there was a reasonable inference that Leon was being a lookout for someone. But, as the court noted in denying the motion for new trial, Leon could have been a lookout for Medina while Medina ransacked the car or went inside the house to steal or he could have been looking out for Medina while he urinated or he could have been looking out for the guy who went to get the alcohol. Medina further argues by Leon's saying he did not go inside the house, the implication is someone entered the house. Had the court also redacted the part of Leon's statement that he did not enter the residence, there would be no inference that the someone he was standing lookout for went inside the house. But as redacted, the statement violated Medina's right to confront a witness because it implied Medina went inside the residence, the act prohibited by the burglary statute. (Pen. Code, §[3] 459.) Thus, the statement tended to inculpate Medina. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1123.)

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[3] All statutory references are to the Penal Code.

"Under the *Chapman* test, *Aranda-Bruton* error is harmless where the properly admitted evidence against defendant is overwhelming and the improperly admitted evidence is merely cumulative. To find the error harmless we must find beyond a reasonable doubt that it did not contribute to the verdict, that it was unimportant in relation to everything else the jury considered on the issue in question." (Citation omitted.) (*People v. Song* (2004) 124 Cal.App.4th 973, 984.)

Medina asserts Leon's statement was not unimportant because the trial was a credibility contest between Torres, the victim, and himself. Medina notes he denied entering the house and stated he found the identification card on the sidewalk, suggesting someone else had burgled the car. Medina posits that even though the jury rejected his version of the incident, it was a reasonable version. Not so. Medina testified that at 3:30 in the morning he walked up to a stranger's house and banged loudly on the door in order to use the restroom as he did not want to urinate outside because the police might see him or the guy on the bike might return and catch him. Medina admitted that after he and Leon left the house, he did not urinate before the police stopped them nor tell the police he needed to use the restroom. Thus, Medina's version was inherently implausible and incredible. Medina's participation in the burglary was established because he was caught in the house and was in possession of stolen property. Thus, the statement was cumulative and the error in admitting the statement was harmless beyond a reasonable doubt.

III. Impeachment

Defendants contend the trial court improperly limited their attempts to examine Officer Gallegos on the exact words Leon used in saying he was acting as a lookout.

At the preliminary hearing, Gallegos testified that while being transported to the police station, Leon told Gallegos he did not enter the residence and "was standing outside just kind of as a lookout." Gallegos also testified Leon stated he did not enter the

residence, and that he was standing outside as a lookout while his friend Medina entered the residence and that "[h]e was just standing outside . . . sort of like a lookout." Gallegos testified the words were Leon's. At trial, Leon's statement was redacted to avoid any reference to Medina or anyone else.

At trial, on direct examination, Gallegos testified Leon told Gallegos that he (Leon) did not enter the residence and "was just standing outside as lookout." During cross-examination, defendants attempted to impeach Gallegos by eliciting that Gallegos had used different language to characterize Leon's statement at the preliminary hearing.

The prosecutor objected the attempt to impeach Gallegos with his preliminary hearing testimony was inappropriate because it was not inconsistent with Gallegos's trial testimony. Defense counsel argued Gallegos's testimony that Leon said he was standing outside "'sort of like a lookout'" was "a whole different ballgame than saying he said that he was acting as a lookout" and that the phrase "'sort of like a lookout'" was less emphatic than the trial testimony Leon said he "'was a lookout.'" Defense counsel also noted that Leon's purported statement was the only thing that tied Leon to the burglary and urged there was "some room here for interpretation."

After defense counsel repeated her argument about the use of "'sort of,'" the court determined there was no inconsistency because Gallegos testified at the preliminary hearing that "'these are his words'" and that even though the use of "'sort of'" might make it sound as though the words came from the officer, in this case, it did not make the testimony impeachment because of the context in which Gallegos used the words.

The court sustained the prosecutor's objection as it did not believe the statements impeached Gallegos because he said those were Leon's words. The court also ruled that because of the redaction of the reference to Medina and the lack of impeachment, the probative value of the portion of the preliminary hearing testimony defense wanted to use was "extremely weak" and would involve an undue consumption of time.

We agree with the trial court that within the context of the redaction of the reference to Medina, Gallegos' trial testimony was not inconsistent with his preliminary

hearing testimony. According to Gallegos both at the preliminary hearing and at trial, Leon used the word "lookout."

On cross-examination, Leon's counsel asked Gallegos if he was sure Leon had used the word "lookout" so an entire line of questioning was not precluded. (See *Chambers v. Mississippi* (1973) 410 U.S. 284, 295-298.) Thus, because Gallegos' testimony was not inconsistent with his preliminary hearing testimony, defendants' rights to due process, to present a defense and to confront and cross-examine witnesses were not violated, and the court did not abuse its discretion when it sustained the prosecutor's objection. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

IV. *Wheeler/Batson*

Defendants contend the denial of their *Wheeler/Batson* motion denied them their constitutional right to a jury drawn from a representational cross-section of the community. (*People v. Turner* (1994) 8 Cal.4th 137, 164 disapproved on another point in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn 5 ["'It is well settled that the use of peremptory challenges to remove prospective jurors solely on the basis of a presumed group bias based on membership in a racial group violates both the state and federal Constitutions.'"].)

"We review the trial court's ruling on the question of purposeful racial discrimination for substantial evidence" and "give deference to the court's ability to distinguish 'bona fide reasons from sham excuses.'" (*People v. Avila* (2006) 38 Cal.4th 491, 541; see also *People v. Bonilla* (2007) 41 Cal.4th 313, 341-342.)

"Because *Wheeler* motions call upon trial judges' personal observations, appellate courts generally accord great deference to their determination that a particular reason is genuine. However, 'we do so only when the trial court has made a sincere and reasoned attempt to evaluate each stated reason as applied to each challenged juror. When the prosecutor's stated reasons are both inherently plausible and supported by the record, the

trial court need not question the prosecutor or make detailed findings. But when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.'" (Citations omitted.) (*People v. Allen* (2004) 115 Cal.App.4th 542, 548; see also *Miller-El v. Cockrell* (2003) 537 U.S. 322, 339 [The credibility of reasons given can be measured by "the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy."].)

Two prospective allegedly Hispanic jurors[4] were excused before defendants made their motion. The prosecutor excused juror number 7345 because the juror had his hair cut in a "Mohawk." The prosecutor stated she found that rather disturbing. The prosecutor excused juror number 7120 because he had let tickets go to warrant, leading to his arrest, which showed a certain irresponsibility, and because he stated "pretty adamantly" that he had no bias or prejudice and the prosecutor found it rather impossible for a person to express such a conclusion. (See *People v. Cardenas* (2007) 155 Cal.App.4th 1468, 1475 ["Although the issue appears to be one of first impression in California, courts in other jurisdictions have uniformly held the fact the prosecutor distrusts a juror or finds the juror's responses not credible is a sufficiently race-neutral reason for using a peremptory."].)

The court did not state defendants had made a prima facie case of discrimination but listened to the prosecutor's explanations and then denied defendants' *Batson/Wheeler* motion without comment or further inquiry. (See *Johnson v. California* (2005) 545 U.S. 162, 168 [setting out the three steps guiding a trial court's review of a peremptory challenge].) It would have assisted this court if the trial court had stated on the record

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[4] The court noted both jurors appeared to be Latino. The prosecutor observed that she thought one of those jurors was African-American.

why it found the prosecutor's explanations satisfactory, but by denying the motion, the trial court impliedly found the jurors were not excused on the basis of group bias against Hispanics.

Defendants assert the court did not make a sincere and reasoned evaluation of the prosecutor's explanation of why she excused those two jurors. (See *Collins v. Rice* (9th Cir. 2004) 365 F.3d 667, 678 ["'[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination.'"].) In particular, defendants note the prosecutor did not ask juror number 7345 if he could be fair and did not question that juror at all so she could not tell if that juror would cooperate with other jurors. Defendants further suggest Mohawk haircuts are common for those playing sports and might be a sign of conformity to a norm. Defendants complain the prosecutor did not ask juror number 7120 about his arrest on traffic violations when he was a teenager and did not ask if the juror resented law enforcement, noting the juror was now older and married showing he was not irresponsible.

"'Jurors may be excused based on "hunches" and even "arbitrary" exclusion is permissible, so long as the reasons are not based on impermissible group bias.'" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122; see also *People v. Williams* (1997) 16 Cal.4th 635, 664 ["[A]dequate justification by the prosecutor may be no more than a 'hunch' about the prospective juror, so long as it shows that the peremptory challenges were exercised for reasons other than impermissible group bias and not simply as 'a mask for race prejudice.'" (Citation omitted.)].) "[A] prosecutor may fear bias on the part of one juror because he had a record of prior arrests or has complained of police harassment, and on the part of another simply because his clothes or hair length suggest an unconventional lifestyle." (*People v. Wheeler* (1978) 22 Cal.3d 258, 275.) "The proper focus of a *Batson/Wheeler* inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on objective *reasonableness* of those reasons." (Original emphasis.) (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.)

As an example, the *Reynoso* court upheld the challenge to a prospective juror with long, unkempt hair, and a mustache and a beard, reasoning: "It matters not that another prosecutor would have chosen to leave the prospective juror on the jury. Nor does it matter that the prosecutor, by peremptorily excusing men with long unkempt hair and facial hair on the basis that they are specifically biased against him or against the People's case or witnesses, may be passing over any number of conscientious and fully qualified potential jurors. All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory. '[A] "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection.'" (*People v. Reynoso, supra,* 31 Cal.4th at p. 924.)

"There is more to human communication than mere linguistic content." (*People v. Lenix* (2008) 44 Cal.4th 602, 622.) "Ultimately, an advocate picking a jury is selecting a committee to decide the case. In addition to each panelist's individual characteristics, the group must be able to work together with courtesy and dispassion to reach a complex result with substantial consequences." (*Id.*, at p. 623.) Thus, even though defendants might not agree with the prosecutor's assessment of the meaning of the Mohawk haircut, it was for the court to determine if the reason was sincere and there was nothing to suggest it was not.

When the prosecutor asked juror number 7120 if he had any prejudices or bias, the juror responded, "Maybe I do, but I'm not even -- they don't even come up in my mind, so maybe -- they're very thin." When the prosecutor asked juror number 7120 if he had ever experienced a miscommunication, the juror responded, "I'm pretty sure I have. I've had some, but not -- not that would have maybe -- that I could have not handled or was not resolved or was not interpreted to the person that misunderstood it. Nothing that would affect me in any way, you know, doing my jury service here."

Defendants present reasons why juror number 7120 was now responsible and urge that the prosecutor exaggerated the juror's responses to questions about his prejudices and biases. Defense counsel cannot substitute his assessment of a prospective juror for that of the prosecutor if the prosecutor's reasons are not race based. Again it was for the court to assess if prosecutor's reasons were sincere.

Defendants suggest the prosecutor should have cross-examined the two jurors more intently about whether they could be fair or about their prejudices and biases. Such questions might have alienated the other jurors. (See *People v. Wheeler*, *supra*, 22 Cal.3d at p. 275 ["[I]n many instances the party either cannot establish his reason by normal methods of proof or cannot do so without causing embarrassment to the challenged venireman and resentment among the remaining jurors."].)

Consequently, we affirm the denial of the *Wheeler/Batson* motion as we defer to the trial court and the prosecutor's reasons were plausible and supported by the record.

Even given the possible instructional errors, the cumulative effect of those errors does not require reversal. (*People v. Hill* (1998) 17 Cal.4th 800, 844.)

V. *Pitchess* Review

Defendants request this court review the materials sealed by the court after its in camera review of Gallegos's personnel file in connection with Leon's *Pitchess* motion.

"A trial court's decision on the discoverability of material in police personnel files is reviewable under an abuse of discretion standard." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220.) We independently review the sealed transcript. (See *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

The court described its review of the file -- the file contained various subfiles for equipment issued, evaluations, training and education, commendations and discipline, and miscellaneous materials, including a field training manual and tests taken by the officer. The court noted there were no complaints about this officer. The custodian of

records for the San Fernando Police Department confirmed he had brought the entire personnel file and there were no complaints against Gallegos. The court conducted a proper review of the personnel file and made a record of its findings and thus did not abuse its discretion. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228.)

VI. Juvenile Prior

Medina contends the court erred by using his juvenile offense as a strike because he was not afforded a jury trial when his juvenile offense was adjudicated. Medina cites *U. S. v. Tighe* (9th Cir. 2001) 266 F.3d 1187, 1194 as support. The reasoning of *Tighe* was rejected in *People v. Bowden* (2002) 102 Cal.App.4th 387, 391-394. This court recently held that pending a contrary decision of the California Supreme Court, "'a juvenile adjudication may be used as a strike to enhance an adult offender's sentence notwithstanding the absence of the right to a jury trial in delinquency proceedings.'" (*People v. Del Rio* (2008) 165 Cal.App.4th 439, 441; see also *People v. Pearson* (2008) 165 Cal.App.4th 740, 748, fn. 3 [stating the prevailing view is that prior juvenile adjudications may be used as strikes and listing cases adhering to that position].)

VII. Abstract of Judgment

The court sentenced Leon to the low term of two years pursuant to section 459. The minute order and abstract of judgment for his conviction improperly reflects he was sentenced pursuant to section 667, subdivisions (b) through (i) and/or section 1170.12, subdivisions (a) through (d). We will order the trial court to correct the minute order and the abstract of judgment to reflect the sentence actually imposed. (See *People v. Zackery* (2007) 147 Cal.App.4th 380, 385.)

DISPOSITION

The superior court is directed to modify the minute order imposing Leon's sentence and Leon's abstract of judgment to delete the reference to his being sentenced pursuant to section 667, subdivisions (b) through (i) and section 1170.12, subdivisions (a) through (d). The superior court is ordered to prepare and file with the Department of Corrections an amended abstract of judgment for Leon reflecting that change. In all other respects, the judgments are affirmed.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**